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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 874 75

ILLINOIS CENTRAL RAILROAD COMPANY, PETITIONER,
vs.
G. I. CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF

The New York, Chicago & St. Louis Railroad Company, The Pennsylvania Railroad Company, Southern Railway Company, The New York, New Haven & Hartford Railroad Company, Norfolk & Western Railway Company, Central Railroad of New Jersey, Western Maryland Railroad Company, Atlantic Coast Line Railroad Company, Great Northern Railway Company, Minneapolis, St. Paul & Saulte Ste. Marie Railway Co., The Minneapolis & St. Louis Railroad Company, W. H. Bremner, Receiver; Atchison, Topeka & Santa Fe Railway, and Missouri-Kansas-Texas Railroad Company,

FOR LEAVE TO FILE A STATEMENT, AMICI CURIÆ, IN SUPPORT OF PETITION FOR CERTIORARI HEREIN.

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FOR LEAVE TO FILE A STATEMENT, AMICI CURIÆ, IN SUPPORT OF PETITION FOR CERTIORARI HEREIN.

Now come The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company and each of the other common carriers whose

names are above set forth and signed hereto, and representing to the Court their pecuniary interest in and concern with the important question of general law sought to be brought before this Court for its consideration and final disposition by means of the Petition for Certiorari filed by the Illinois Central Railroad Company as Petitioner, wherein G. I. Crail, doing business as P. McCoy Fuel Company, is named as Respondent, and severally move this Honorable Court for leave to file *Amici Curiæ*, the following statement and suggestions in support of said Petition.

Written consent to the filing of this Statement and for its submission to the Court with other papers pertaining to said Petition for Certiorari, subscribed by counsel of record for both said Petitioner and said Respondent, has been lodged with the Clerk of this Court.

As ground for this motion it is respectfully shown that each of the carrier companies named above and party hereto is a common carrier of freight by steam railroad subject to the provisions of the Act to Regulate Commerce, as amended, and as such, and because of losses occurring in the course of freight transportation, is subjected to frequent and constantly recurring claims for damages, many of which claims are well grounded upon the facts involved, but cannot be promptly and amicably settled between the shippers or consignees and the carrier concerned because of the diverse views of courts, both Federal and State, as set

forth in the reports, as to the measure of damages properly to be applied in given circumstances, with result that irritation between shippers and consignees or other users of such common carrier services is engendered, the volume of litigation is unnecessarily increased, and the prompt allowance of many meritorious claims for losses which have occurred and in the future without doubt will frequently occur, is prevented.

It is believed that the question of law presented by the record in this cause is of nation wide interest. The numerous authorities assumedly in point and cited by the District Court and by the Circuit Court of Appeals for the Eighth Circuit; the differing conclusions expressed therein, and the opposed conclusions of said courts, based on each court's appreciation of the cases so cited, bear speaking judicial testimony to the necessity, in furtherance of uniformity of decision, of an authoritative exposition and reconcilement of the fundamentals involved.

The shipment involved in the instant case, as well as those likely to be involved in pending and future claims against amotioners and other common carriers who may be similarly circumstanced, involve movements of freights in interstate commerce on uniform bills of lading.

In such cases it is provided by law (Cummins Amendment, Act of March 4, 1915, 38 Stat. 1196, ch. 176; U. S. Code, Title 49, Chapter 1, Transportation, Sec. 20), that any common carrier railroad subject to the provisions of the Act to Regulate Commerce, as amended,

who shall receive or move property in interstate commerce shall be liable to any holder of or party entitled to recover on any receipt or bill of lading covering such property "the full actual loss, damage, or injury to such property caused by it," the carrier.

While it has been said that the prime effect of this amendment was not to establish a new rule for the measurement of damages for losses attaching to goods in transit but only to prevent effective limitation of carriers' liability therefor, nevertheless, question as to elements and rule by which any such "full actual loss, damage or injury to such property" shall be ascertained, persists.

It is not difficult to agree that ascertainable market value of such or similar goods at place and time of contract delivery shall constitute the generally applicable measure of damage for loss sustained, but where two or more differing market values, dependent upon vicarious circumstances, exist at point of delivery at the same time, *e. g.*, wholesale or large lot and retail or small lot value, the question as to which of such values shall be used to ascertain and measure the "full *actual* loss and damage," of a large lot shipper who has suffered a small lot loss, possibly by dribbling or pilfering from the mass in transit, in circumstances not requiring prompt or even eventual replacement, there is presented, as in the instant case, a question as to the solution of which many courts have differed, and, in the absence of some illuminating pronouncement by this Court which is of final resort in such matters, will undoubtedly continue to differ as heretofore thus causing existing confusion to become but the worse confounded.

In the instant case both the District Court and the Circuit Court of Appeals concurred in and stressed the thought that the value of the 5,500 pounds of coal lost from the carload shipment while in transit, measured the owner-consignee's full actual loss and damage, but the learned District Court thought and ruled that the value of the lost coal *in the car* at place of delivery, rather than the retail price at which it could be replaced there—no such replacement being either called for or in contemplation by either party—measured to the owner's "full *actual* loss" (2 Fed. (2d), 287, 288), while the learned Circuit Court of Appeals, in reversing the trial court, thought and ruled (13 Fed. (2d) 459, 461) that the shipment in question being interstate and governed by the Cummins Amendment above referred to, the true measure of damages prescribed for the carriers' breach of its contract to transport and deliver the coal that was lost in transit, was "the fair average market value at the time and place of delivery, of such a quantity of like coal" as the carrier had failed to deliver—that is, what it would have cost the owner at such time and place to purchase coals in the open retail market to replace those lost, although such replacement was not made, nor necessary, nor was in contemplation of the parties at initiation of the transportation service, or at the delivery accepted by consignee of what remained (Stipulation of Facts, VIII, Rec. 9).

On giving judgment on the new or second trial of the case (21 Fed. (2d) 836), the learned District Court (Cant, D. J.), as in duty bound by reason of the opin-

ion of the Court of Appeals allowed plaintiff to recover from the carrier at the retail market price at which the lost coal could have been replaced in the vicinage of point of delivery, but having pointed out that the case was of "unusual interest and importance," and expressing "the fullest measure of respect for the appellate court," he proceeded "to offer further suggestions in the interest of justice upon the questions involved," as the appellate tribunal itself might "at some time wish to reexamine the matters which are here in controversy (*ibid*, 836).

The "suggestions" so respectfully submitted, were cogent and seemingly worthy of consideration on part of the appellate tribunal, which, however, contented itself (Kenyon, Cir. Jus. speaking) with a mere reference thereto in connection with further reference to its own earlier reported opinion, and statement to effect that the two together would afford "full enlightenment as to the facts," concluding as follows (31 Fed. (2d) 111):

> "We are satisfied that the case now presented is the identical one presented to this court and decided in 13 F. (2d) 459. We are therefore confronted with the question as to whether or not on the second writ of error we should reconsider the legal question decided when the case was here before, *i. e.*, the rule of damages to be applied for the loss of the coal in shipment. The rule laid down by this court in its former decision became the 'law of the case.' While it is within the power of the courts to disregard the rule of 'law of the case' in the interest of justice, it is the general practice of courts to refuse

'to reopen what has been decided.' (Citing cases.)"

It is worthy of comment that both the learned Circuit Court of Appeals for the Eighth Circuit in its first opinion (13 Fed. (2d) 459, 461) and the learned District Judge, in the course of his "respectful suggestions" on second trial (21 Fed. (2d) 836, 837) quoted from the opinions of this Court in the cases of

Southern Pacific Co. *v.* Darnell Taenzer Co., 245 U. S. 531; and

Chicago, M. & St. Paul Ry. Co. *v.* McCaull-Dinsmore Co., 253 U. S. 97,

to opposing effects and with contradictory conclusions.

Wherefore, in the general interest of uniformity of decision, both as betwixt the Federal and also as betwixt and between the Federal and numerous State courts; and also because the Circuit Court of Appeals of the Eighth Circuit has decided an important question of general law in a way probably untenable and at the same time has also decided an important and widely interesting question of Federal law which seemingly has not yet been but certainly should be settled by this honorable Court; and also has decided a question of Federal law of general import in a way probably in conflict with decisions of this Court which may be deemed, in some measure at least, applicable thereto;

It is respectfully urged upon this Honorable Court, in the beneficient exercise of the discretionary power conferred upon it by the provisions of Section 240 of

the Judicial Code (U. S. Code Sec. 347), that the writ of certiorari prayed by the petition of said the Illinois Central Railroad Company reasonably should be granted.

Respectfully submitted,

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May, 1929.